Supreme Court, U.S.
FILED
MAR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1481

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OEN YIN-CHOY,
Petitioner,

VS.

GLEN S. ROBINSON,
United States Marshal
for the Northern District of California,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Extradition Treaty between the United States and the United Kingdom preclude extradition of an accused from the United States to Hong Kong when, as a result of the reversion of Hong Kong to Chinese rule on July 1, 1997, the accused will be surrendered by the United Kingdom to China, a country with which the United States has no extradition treaty?

2. Does the Due Process Clause of the Fifth Amendment require that an accused in an extradition proceeding be provided the original signed written statements of non-English speaking witnesses to permit the accused to challenge the accuracy of the foreign government's English translations of the witnesses' statements?

3. Does the Due Process Clause of the Fifth Amendment require that the accused in an extradition proceeding be permitted to cross-examine a key witness of the foreign government when that witness is present at the extradition hearing?

4. What is the proper interpretation of 18 U.S.C. § 3190, which provides that a United States consular officer may certify the authenticity of evidence to be presented in an extradition proceeding: (a) the interpretation of the court below that § 3190 precludes the extradition court from considering any objections to evidence so certified, or (b) the conflicting and contrary interpretation of the First Circuit in *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976), which has been followed in practice by numerous federal district courts?

5. What is the proper interpretation of whether 28 U.S.C. § 455(a) requires a district judge who has issued an extradition order to disqualify himself from hearing a petition for habeas corpus filed to review that order: (a) the interpretation of the court below that recusal is not required, or (b) the conflicting and contrary interpretation compelled by the reasoning of the Fourth Circuit in *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978)?

6. Does the Ninth Circuit's decision here regarding the type of evidence an accused may present in extradition proceedings conflict with the holding of this Court in *Collins v. Loisel*, 259 U.S. 309 (1922)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Oen Yin-choy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on October 5, 1988. The Ninth Circuit affirmed the decision of the United States District Court for the Northern District of California denying Mr. Oen's petition for a writ of habeas corpus. That petition was filed to challenge the district court's Certification of Extraditability, which approved the extradition of Mr. Oen to Hong Kong.[1]

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 858 F.2d 1400, and is reprinted in the Appendix hereto. The relevant orders of the district court have not been reported and are also reproduced in the Appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit's decision. This petition is timely filed following the Ninth Circuit's denial, on December 7, 1988, of Mr. Oen's petition for rehearing and its rejection of the suggestion for rehearing *en banc*. *See* Sup. Ct. R. 20.4. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, in that Mr. Oen's petition for a writ of habeas corpus was a civil action arising under 28 U.S.C. § 2241.

CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

This suit involves application and interpretation of the Extradition Treaty Between the Government of the United States of

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[1] All parties to Mr. Oen's action seeking a writ of habeas corpus are listed in the caption. The habeas action sought review of the earlier extradition proceedings which were initiated by the United States Attorney on behalf of the government of the United Kingdom and the Hong Kong Crown Colony.

America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, 28 U.S.T. 227, T.I.A.S. No. 8468 (the "Treaty"). More specifically, this suit involves Article XII(1) of the Treaty, which prohibits the country requesting extradition from subsequently "extraditing" the accused to a third country, or from proceeding against the accused for offenses other than those which formed the basis of the original extradition request. This suit also involves the Hong Kong Theft Ordinance §§ 19(1)(a) and 21(1), the Due Process Clause of the Fifth Amendment to the United States Constitution, 18 U.S.C. § 3190, and 28 U.S.C. § 455(a). The relevant portions of each of these provisions are set forth in the Appendix.

STATEMENT OF THE CASE

The Hong Kong government is seeking to have Mr. Oen extradited from the United States to Hong Kong. Mr. Oen is a United States permanent resident with Indonesian citizenship. Until 1986 he was the majority shareholder and chairman of the board of Union Bank of Hong Kong. The Hong Kong government has charged Mr. Oen with six counts of "false accounting" in connection with five Union Bank loans and with one count of publishing a false statement in the bank's 1984 annual report.[2]

On March 6, 1987, at the request of the Hong Kong Crown Prosecutor, the United States Attorney for the Northern District of California filed a complaint for Mr. Oen's provisional arrest on the Hong Kong charges. On April 15, 1987, after Mr. Oen's arrest and release on bail, the United States Attorney filed the Hong Kong government's Request for Extradition (the "Request"),

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[2] The Hong Kong government claims that the loans were false because their proceeds were not disbursed directly to the named borrowers and because the loan proceeds were disbursed in a complicated manner. The loan proceeds allegedly were used to repay a letter of credit issued by Union Bank to Borewell Trading Company Ltd. ("Borewell") and to repay depositors in Union Bank's offshore deposit, or Asian Currency Unit ("ACU"), accounts. The Hong Kong government claims the annual report was false because a footnote therein included these five loans among the bank's assets.

supported by written "affirmations" (*i.e.*, affidavits) submitted at that time.

Prior to the hearing on the Request, Mr. Oen challenged the district court's jurisdiction to order his extradition, arguing that Hong Kong had not satisfied and could not satisfy the prerequisites to extradition set forth in the Treaty. Because of the scheduled transfer of Hong Kong to China in July 1997, Hong Kong could not satisfy the Treaty's requirements that Mr. Oen not be extradited to a third country or tried for offenses other than those on which he was extradited.

Mr. Oen also moved to have the district court exclude ten of the Hong Kong government's affirmations. Those affirmations were written in English, but were signed by witnesses who neither spoke nor read English. Mr. Oen argued that the affirmations had not been properly sworn, as required by the Treaty, and that their admission would violate his due process rights. Alternatively, Mr. Oen moved for production of the original written signed Chinese-language witness statements that were the basis for the ten English-language affirmations. Mr. Oen argued that at a minimum, due process entitled him to challenge the accuracy of the Hong Kong government's translation of the witnesses' testimony.

Finally, Mr. Oen made more than 180 separate objections to the competence and admissibility of statements made in the affirmations submitted by the Hong Kong government.

The district court refused to consider any of Mr. Oen's objections to the Hong Kong government's evidence and denied Mr. Oen's motion for production of the Chinese-language witness statements. The district court also denied Mr. Oen's request to cross-examine the Hong Kong police officer who was present in court and whose written testimony formed the basis for the court's decision to admit the ten translated affirmations. The court also rejected Mr. Oen's argument that Hong Kong had not satisfied the prerequisites to extradition under the Treaty. On September 4, 1987, the district court filed a Certification of Extraditability.

There being no appeal from that Certification, Mr. Oen, on September 10, 1987, filed his petition for writ of habeas corpus.

Pursuant to the "related case" rule of the District Court for the Northern District of California, the habeas petition was reassigned from the judge originally designated to hear the habeas matter to the Honorable Robert H. Schnacke, who had decided the extradition request. Mr. Oen moved for disqualification of Judge Schnacke, pursuant to 28 U.S.C. § 455(a), since habeas was the only means to review Judge Schnacke's extradition rulings. On October 6, 1987, Judge Schnacke denied the motion for disqualification, and on November 13, 1987, he denied Mr. Oen's habeas petition.

Mr. Oen filed a timely appeal to the Court of Appeals for the Ninth Circuit. On October 5, 1988, the Ninth Circuit affirmed the district court's denial of Mr. Oen's habeas petition, and on December 7, 1988, denied Mr. Oen's petition for rehearing and rejected his suggestion for rehearing *en banc*. On December 12, 1988, the Ninth Circuit stayed extradition pending the filing and resolution of this petition for writ of certiorari. (App. P at A-56.)[3]

REASONS FOR GRANTING THE WRIT

This petition presents an important and unresolved question of federal law regarding the meaning and application of the Treaty between the United States and the United Kingdom. This issue—regarding the impact on the Treaty of the scheduled 1997 reversion of Hong Kong to the People's Republic of China—will arise in every extradition request made by Hong Kong between now and 1997. It has not been addressed by any appellate court other than the Ninth Circuit in this matter. Mr. Oen submits that the decision of the Ninth Circuit is in error, and that the unresolved question about the meaning of the Treaty is of such exceptional importance that it should be settled by this Court.

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[3] All references to the Appendix to this petition are denominated "App.," followed by the unique letter assigned to each item. References to the Clerk's Record, United States District Court for the Northern District of California, are denominated by "CR," followed by the district court's docket control number assigned to the document in question and the page number within that document.

This petition also presents a number of important questions regarding the constitutional protections available to the accused, and the evidentiary and procedural rules to be applied, in extradition proceedings. Questions of this type have not been addressed by this Court for 53 years, since its decision in *Valentine v. United States*, 299 U.S. 5 (1936). The law now being applied by the lower federal courts has developed in the context of this Court's pre-1936 decisions. Both commentators and the United States Congress have suggested that the resulting U.S. extradition law is outdated and in need of reform. *See, e.g.*, Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1441-43, 1491-93 (1988); Note, *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual*, IX B.C. Int'l & Comp. L. Rev. 293, 293-95 (1986); *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34 (1983) at 1, 31 (statement of Rep. Hughes), 34-35 (statement of Dep. Ass't Att'y Gen. Olsen), 194-95 (analysis by Prof. Bassiouni).

During the 53 years since *Valentine*, there have been far-reaching changes in both the procedural and the constitutional protections applicable to individuals accused of criminal acts. As a result of these changes, substantial tension now exists between the due process rights afforded to an accused who will be tried in this country and the rights that the lower federal courts—following this Court's pre-1936 decisions—afford an accused who will be extradited to another country to stand trial. *See* Kester, *supra*, 76 Geo. L.J. at 1442, 1444-46.[4] This tension has resulted in numerous conflicting decisions by the lower courts as they try to apply those older opinions in the context of modern

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[4] Although extradition proceedings are often characterized as not strictly criminal in nature, the full "coercive power of the state" is brought to bear on a person sought for extradition, and his liberty is significantly restricted by pretrial detention, the need to post bail, and the potential that he will be removed to a foreign state to stand trial on the criminal charges. Kester, *supra*, 76 Geo. L.J. at 1445-47; *cf. Van Cauwenberghe v. Biard*, ____ U.S. ____, 108 S. Ct. 1945, 1951 (1988).

procedural protections. Several such conflicts are presented by this petition.

The past 53 years also have seen a dramatic increase in the number of extradition requests processed by the United States, with even greater increases expected in the future. *See 1983 Hearings on H.R. 2643* at 34, 42-44 (testimony of Dep. Ass't Att'y Gen. Olsen); Kester, *supra*, 76 Geo. L.J. at 1443. This growth in the importance of international extradition makes it essential that this Court resolve the conflicting lower court decisions and clarify extradition law as sought by this petition.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE HONG KONG'S EXTRADITION REQUEST VIOLATES THE U.S.-U.K. TREATY

Extradition requests made to the United States by Hong Kong are presently governed by the Treaty. (App. A at A-1.) The United States courts only have jurisdiction to order extradition of a person to Hong Kong pursuant to the terms and conditions of that Treaty. *See In re Locatelli*, 468 F. Supp. 568, 570 (S.D.N.Y. 1979). *See also* Treaty, Art. I.

Because of the United Kingdom's plan to surrender sovereignty over Hong Kong to China in 1997, Hong Kong cannot satisfy two of its obligations under the Treaty: the requirement that an extradited individual not be extradited to a third country and the requirement that an extradited individual be tried only on the charges for which he is extradited. The district court should have denied extradition because of Hong Kong's failure to satisfy these conditions. Although the district court erroneously granted extradition, it did recognize Mr. Oen's arguments as raising significant issues of first impression: "I suspect we have a matter that the [appellate] courts are going to want to look at." (CR 12 at 1589.) Indeed, these important questions of international law will arise in every extradition request by the Hong Kong government for the next eight years. For that reason, certiorari should be granted.

A. Hong Kong Cannot Satisfy the Treaty Requirement that Mr. Oen Not Be Extradited to a Third Country

The first precondition to extradition that was not satisfied here is found in Article XII(1) of the Treaty, which provides:

> A person extradited *shall not be detained or proceeded against* in the territory of the requesting Party *for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted*, or on account of any other matters, *nor be extradited by that Party to a third State*—
>
> (a) until after he has returned to the territory of the requested Party; or
>
> (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(Emphasis added.) (App. A at A-2-A-3.) Thus, Hong Kong is prohibited from surrendering Mr. Oen to a "third State" until "after he has returned to the territory of the requested Party [the United States]" or until thirty days after he is given the freedom to return to the United States. Extradition cannot be granted unless the country requesting extradition guarantees this protection to the accused.

Mr. Oen is accused of crimes carrying a maximum cumulative sentence of 49 years. (*See* App. D at A-8; CR 13 at Conyngham Aff. ¶¶ 15-16.)[5] If extradited and convicted, Mr. Oen could be incarcerated in Hong Kong through July 1, 1997, when sovereignty over Hong Kong passes to China. (App. T at A-77-A-78.) As a result of the United Kingdom's surrender of Hong Kong, Mr. Oen, in effect, will have been extradited to a third state, China, in violation of Article XII(1). The Hong Kong government has refused to guarantee that this will not happen. Therefore, the Hong Kong government did not satisfy Article XII(1) of

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[5] Each crime charged in the seven-count complaint has a potential sentence of seven years' imprisonment. (App. D at A-8; CR 13 at Conyngham Aff. ¶¶ 15-16.)

the Treaty, and the district court lacked jurisdiction to issue a certification of extraditability.

The Ninth Circuit held there was no violation of Article XII(1), because the surrender of Mr. Oen to China in 1997 would not be an "extradition." (App. F at A-13.) Under the Ninth Circuit's reasoning, the Treaty prohibits Hong Kong from formally extraditing Mr. Oen and others in his situation to third countries, yet permits an informal "surrender" of such persons. The Ninth Circuit's formalistic distinction between "extradition" and "surrender" renders meaningless the undertakings set forth in Article XII(1), and ignores the overriding intent of the United States that persons extradited from this country not be transferred to nations having systems of justice far different from ours.[6]

B. Hong Kong Cannot Satisfy the Treaty Requirement that Mr. Oen Not Be Prosecuted for Additional Offenses

The pending transfer of Hong Kong to China also precludes satisfaction of the doctrine of "specialty." That doctrine prohibits the country requesting extradition from prosecuting the accused—once extradited—for any offense other than that for which the surrendering country agreed to extradite him. *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). This principle of international law is codified in Article XII of the Treaty, which prohibits detention, trial, or prosecution for any offenses other than those which form the basis for the extradition order. *Quinn*, 783 F.2d at 783. (*See also* App. A at A-2.) Specialty is based on comity, and requires that the requesting state "live up to whatever promises it made in order to obtain extradition." *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986). The

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[6] During the Congressional debates concerning the Supplementary U.S.-U.K. Extradition Treaty of 1986, Senator John Kerry expressed the Senate Foreign Relations Committee's intent: "[The United States] will not extradite a fugitive to a system of justice unacceptable to us," *i.e.*, a nation that does not "respect these fundamental individual safeguards" of "human rights and civil liberties." 132 Cong. Rec. S9257 (daily ed. July 17, 1986).

person facing extradition is entitled to raise objections based on the doctrine of specialty. *Id.*

The undisputed evidence presented below by Professor Chiu, an expert on Chinese law, established that the unique features of Chinese law and the ambiguities in Hong Kong's transition to Chinese control will allow the Chinese government to assert jurisdiction over crimes that occurred in Hong Kong before 1997. (App. T at A-82.) Even if Mr. Oen is tried in Hong Kong before 1997, Chinese law and practice would permit his retrial and resentencing after 1997.[7] (*Id.* at A-83-A-84.) This is significant because the Chinese criminal justice system rejects the Western principle of *nulla poena sine lege* (no punishment without a pre-existing prohibitory rule). (*Id.* at A-89.) Chinese criminal law also is drafted in general terms (*id.* at A-88) and contains a provision that where no crime specifically covers a given act, a person may be punished according to the most closely analogous existing statute. (*Id.* at A-89.) Thus, if Mr. Oen is extradited, convicted, and subsequently passed into Chinese custody, he will be subject to retrial under Chinese law for offenses other than those for which he has been extradited. Since Hong Kong cannot guarantee that China will not prosecute him for additional offenses, his extradition would violate Article XII(1) of the Treaty and the doctrine of specialty.

The Ninth Circuit found no Treaty violation, stating that the Treaty is binding only upon the United Kingdom and Hong Kong, but not upon third states. (App. F at A-14.) Yet, the fact that China is not bound by the Treaty's commitments is *precisely* why Hong Kong's refusal to guarantee that Mr. Oen will not be transferred to China constitutes a fundamental violation of the Treaty. The Ninth Circuit states that under Mr. Oen's treaty interpretation, extradition to Hong Kong "would be the exception rather than the rule." (*Id.*) The Ninth Circuit ignores the

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[7] Chinese criminal procedure does not prescribe any time limit on the reopening of a previously decided case. (App. T at A-83.) There is no barrier under Chinese law to the *ex post facto* application of Chinese law and procedure to acts committed in Hong Kong prior to 1997. (*Id.* at A-84-A-85.)

judiciary's fundamental responsibility to uphold the law as it is written. If the executive branch is uncomfortable with the terms of the existing Treaty, then it can negotiate with the United Kingdom a modification to the Treaty, subject to Senate review and approval, that resolves the troubling issue of the status of extradited U.S. prisoners when Hong Kong reverts to China. Until such renegotiation takes place, however, the rule of specialty is U.S. law and should have been applied to bar extradition here.

During the debates concerning the Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, ratified and entered into force December 23, 1986 (132 Cong. Rec. S9120 (daily ed. July 16, 1986)), the Senate Foreign Relations Committee found "particularly disturbing" the executive branch's contention that Northern Ireland's judicial system was fair. 132 Cong. Rec. S9257 (July 17, 1986). If the Senate found controversial the notion of extraditing alleged IRA terrorists to a country under British rule, it is inconceivable that the Senate would intend that a 70-year old man in ill health, accused of accounting offenses, can be surrendered to China, whose criminal justice system is radically different from ours and has never been examined by our Senate.[8]

Finally, the Ninth Circuit mistakenly assumed that the U.K.-China Joint Declaration regarding the 1997 reversion of Hong Kong ("Joint Declaration") and the proposed Basic Law of the Hong Kong Special Administrative Region ("Basic Law") guarantee that the existing laws and judicial system of Hong Kong will remain intact after 1997. (App. F at A-14.) However, as a leading commentator on these matters has stated:

> A joint declaration is more an announcement of intention rather than a binding treaty . . . , the document amounts to a mere unilateral declaration of policy by the PRC towards the

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[8] *See* Senator Pete Wilson's October 19, 1988, letter to Secretary Shultz (reflecting disagreement with the Ninth Circuit's Treaty interpretation). (App. Y at A-113-A-114.)

> Hong Kong people. . . . Should Beijing renege on its promises later, the British government would be in no position to help the people of Hong Kong other than to give moral support.

(App. BB at A-126.) (*See also id.* at A-127-A-129; App. W at A-107; App. X at A-110-A-112.) The Basic Law has been criticized for failing to implement important provisions of the Joint Declaration. (App. AA at A-118-A-123.) Moreover, since the Basic Law grants the Standing Committee of the National People's Congress of the People's Republic of China the power to invalidate any existing Hong Kong laws that it finds inconsistent with the Basic Law, and to interpret the meaning of the provisions of the Basic Law, it is China, not Hong Kong, that has the power to decide whether Hong Kong's existing laws remain in effect after 1997. (*See* App. Z at A-115-A-117; App. BB at A-125-A-131.) Thus, neither the Joint Declaration nor the Draft Basic Law can mitigate Hong Kong's failure to satisfy the rule of specialty as required by the Treaty.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE RIGHT OF THE ACCUSED TO CHALLENGE THE ACCURACY AND RELIABILITY OF TRANSLATED WRITTEN TESTIMONY

The bulk of the probable cause "evidence" against Mr. Oen is contained in ten English-language "affirmations" (*i.e.*, affidavits) signed by Chinese-speaking witnesses who do not speak or read English. (*See* CR 10 at 975-985; CR 11 at 1295-99.) Although these affirmations resulted from a flawed and highly questionable police interview and translation process, and were replete with odd locutions, grammatical and syntactical errors, and incoherent passages, Mr. Oen was denied the opportunity to examine the witnesses' written Chinese statements on which the English affirmations were based. Denying Mr. Oen the opportunity to challenge the accuracy of the government's translations violated due process and undermined the integrity of the extradition court's probable cause finding. Certiorari should be granted to clarify the due process requirements for presenting translated testimony in extradition proceedings, an issue that will repeatedly arise.

Mr. Oen presented uncontested testimony of an expert in Chinese-to-English translation, who, after analyzing the errors in syntax and grammar present in the ten affirmations, concluded that more than one translator was involved in drafting them, that at least one of the translators was of dubious ability, and that there may be more serious translation errors than those readily apparent to the reader of the English texts. (App. R at A-63-A-64.) Accordingly, Mr. Oen sought the exclusion of the ten affirmations or, alternatively, the production of the original written witness statements from which the affirmations were derived.

The extradition court initially ruled as follows:

> [T]he defense is certainly entitled to see the original [written witness statements] and compare the original to the translation and to verify the translation.
>
> The defense has made a fairly strong case that there are, obviously, areas of I won't say incompetent translation, but translation that raises substantial question about the competency of the translator.

(App. G at A-23.)

After initially denying the existence of any Chinese written statements (CR 11 at 1103 n.1; App. G at 24), the government conceded their existence (CR 12 at 1405-06; App. I at A-30), but continued to resist their production on the ground that if Mr. Oen were given the witnesses' original statements,

> the Court would thereafter be provided by the defense with a detailed list of the differences between the contents of these statements and the submitted affirmations.

(CR 12 at 1515.) Of course, the government's concession of "differences" between the original written statements and the affirmations only made more urgent Mr. Oen's request for production; Mr. Oen's expert had correctly concluded that the translations were flawed. The cause of these flaws was revealed by the government's disclosure of the questionable process by which the ten affirmations were created—a process rife with opportunity for misunderstandings, poor translations, and police biases to

adversely affect the reliability and competence of the affirmations.[9]

Mr. Oen should have been allowed to examine the written Chinese statements and to challenge the accuracy of the translations. Since the exact connotation given to foreign words may determine whether probable cause exists, fairness requires that foreign-language testimony submitted against an accused be accurately translated. *See People v. Gutierrez*, 137 Cal. App. 3d 542, 546-47, 187 Cal. Rptr. 130 (1982); 5 Wigmore, *Wigmore on Evidence* § 1393 at 146 (Chadbourn Rev. 1974). Likewise, due process requires that a party facing extradition be given the opportunity to challenge the accuracy of the government's translations and to offer his own translations. *In re Artukovic*, 628 F. Supp. 1370, 1376 (C.D. Cal. 1986). *See also Escobedo v. United States*, 623 F.2d 1098, 1103 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980).

The Ninth Circuit sidestepped this issue by assuming that the district court's finding that there were no original written Chinese statements was not clearly erroneous. (App. F at A-16-A-17.) This is a total misreading of the record.[10] Chief Inspector Ip Lau

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[9] The ten affirmations were created as follows: the witnesses gave oral statements in Cantonese, which were transcribed in Chinese by police officers; the written Chinese statements were reviewed and signed by the witnesses; these written statements were then translated into English by different police officers; the English translations were given to still other police officers who altered them and converted them into English-language "affirmations." (App. V at A-99-A-103; CR 12 at 1453-55, 1521-24.) The alterations were purportedly made so that the statements would progress in a more "coherent" manner in English. (App. U at A-97.) Police officers made further changes in the text of the affirmations, purportedly to improve their coherency and grammar. (*Id.*) Thus, by the time the government submitted the affirmations, the witnesses' original statements had been re-worked by four layers of police personnel.

[10] Although this Court generally is reluctant to set aside reasonable conclusions of lower courts on purely factual issues, it "has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution." *Berenyi v. Immigration Director*, 385 U.S. 630, 636 (1967). Here, due process is implicated by

Chuen's affidavit clearly refers to *signed written witness statements in Chinese:*

> Evidence elicited from the interview would then be recorded in the statement format. Whenever draft statements had been prepared they would be handed to the witnesses for them to make any correction, deletion or insertion, if they so required. The *statements* would then be *finalized* or *rewritten* if necessary prior to the *witnesses signing them.*

(App. V at A-101; emphasis added.) Moreover, the case agent, Lulu Yui, submitted an affidavit that unequivocally demonstrated that the ten challenged affirmations were based upon the witnesses' written Chinese statements. (App. U at A-95.)

Given Mr. Oen's undisputed evidence regarding the affirmations' unreliability and given the government's revelations regarding the flawed interview/translation process, due process required production of the original witness statements to enable Mr. Oen to test whether the ten affirmations accurately reflected the witnesses' testimony.

III. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE RIGHT OF THE ACCUSED TO CROSS-EXAMINE WITNESSES PRESENT AT THE EXTRADITION HEARING

Mr. Oen sought to cross-examine the case agent, Lulu Yui, who had submitted key affidavit testimony[11] (App. U at A-93-A-98) and who was present in the courtroom during the extradition hearing. (App. I at A-36-A-37.) Although the extradition court initially stated that cross-examination was appropriate, it denied

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the refusal to permit Mr. Oen to challenge the accuracy of the translated testimony that was at the heart of the government's case.

[11]Agent Yui's affidavit was the linchpin for admission of the ten challenged English-language affirmations, which in turn were essential to the court's finding of probable cause. Yui oversaw the process by which the English-language affirmations were crafted by the Hong Kong police. She drafted and edited a number of them personally. (App. U at A-95-A-98.) Without her testimony, the ten affirmations were, in the court's view, "totally meaningless." (App. G at A-23-A-24.)

the defense request when the government "strongly" objected. (*Id.*) This denial was a deprivation of due process.

In *Grin v. Shine*, 187 U.S. 181, 184 (1902), this Court observed that extradition procedures are governed by "well-settled principles of criminal procedure . . . ." One of the oldest of these principles is the accused's right to be confronted with the witnesses against him.

> This language [regarding confrontation] "comes to us on faded parchment" . . . with a lineage that traces back to the beginnings of Western legal culture.

Coy v. Iowa, ____ U.S. ____, 108 S. Ct. 2798, 2800 (1988) (citations omitted). The right of cross-examination has been described as "the principal means by which the believability of a witness and the truth of his testimony are tested . . . " and the "greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. ____, 107 S. Ct. 2658, 2662 (1987) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974) and *California v. Green*, 399 U.S. 149, 158 (1970)). It is "essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Id.*

In affirming the extradition court, the Ninth Circuit announced the sweeping rule that an accused in an extradition proceeding does not have the right of cross-examination, even when the government witness is present in the courtroom. (App. F at A-18-A-19.) Neither of the cases relied upon by the Ninth Circuit reached this result. *See Messina v. United States*, 728 F.2d 77, 80 (2d Cir. 1984); *Simmons v. Braun*, 627 F.2d 635, 636 (2d Cir. 1980). Other authority holding that an accused generally does not have the right to cross-examination in an extradition proceeding is based upon the practical policy decision that a foreign country should not be put to the cost and inconvenience of transporting a witness to this country. *See Bingham v. Bradley*, 241 U.S. 511, 517 (1916), *cited by Simmons v. Braun*. In *Bingham*, the inconvenience to the foreign government outweighed the accused's right to cross-examination.

By contrast, here, it is undisputed that the government witness was present in the courtroom, and that no undue cost or inconve-

nience could have resulted from cross-examination. (App. I at A-36-A-37.)

The Ninth Circuit's new rule goes beyond prior case law, has no sound policy rationale, and contradicts case authority holding that an accused facing extradition is entitled to due process. *See Caltagirone v. Grant*, 629 F.2d 739, 748 & n.19 (2d Cir. 1980); *Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980). As this Court has stated:

> Good faith toward foreign powers, with which we have entered into treaties of extradition, does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defenses as others accused of crime within our own jurisdiction. . . . These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.

Grin v. Shine, 187 U.S. at 184. Certiorari should be granted to reconcile *Grin* and *Bingham*, and to clarify that the accused does have the fundamental right to cross-examine government witnesses present at the extradition hearing.[12]

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[12] The bill before Congress in 1983 designed to reform this nation's extradition laws (H.R. 2643) provided the accused the right to "confront and cross-examine witnesses." *Reform of the Extradition Laws of the United States: Hearings on H.R. 2643 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 34 (1983), at 10. The Justice Department, concurring that our extradition laws were "very outdated," supported another bill which differed from H.R. 2643 on the issue of bail, but otherwise was in general accord. *Id.* at 36. None of the extradition reform bills was passed, and attempts at legislative reform have come to a halt. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1442 (1988).

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A DISTRICT COURT HEARING AN EXTRADITION REQUEST MAY EXCLUDE INCOMPETENT EVIDENCE

Mr. Oen made over 180 objections to the written affirmations submitted by the Hong Kong government. (CR 10 at 806-906, 935-39.) The affirmations contained multiple hearsay, statements lacking foundation, and incompetent opinions. The extradition court refused to consider these objections and the Ninth Circuit affirmed that refusal. In the Ninth Circuit's view, 18 U.S.C. § 3190 requires district courts to admit all evidence submitted to them by a foreign government, as long as a United States consular officer has certified the evidence as authentic. (App. F at A-17-A-18.) This holding—which strips district courts of the power to judge the competency of evidence presented to them—is in direct conflict with the opinion of the First Circuit in *Greci v. Birknes*, 527 F.2d 956, 959-60 (1st Cir. 1976), and with the traditional practices of the federal courts. Certiorari should be granted to resolve this conflict.

Section 3190 provides that items offered in an extradition proceeding

> shall be received and admitted as evidence on such hearing for all purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country . . . and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

According to the Ninth Circuit, "authentication is the only requirement for admissibility of evidence under general United States extradition law." (App. F at A-17-A-18.) Thus, Mr. Oen's "challenges to the reliability and competency of the evidence fail." (*Id.* at A-18.) This holding means that an extradition court must unquestioningly accept whatever evidence is spoon fed to it by a foreign prosecutor.

This result was rejected by the First Circuit in *Greci v. Birknes*. There, the materials submitted by the foreign government had been certified by the U.S. Ambassador to Italy under section 3190. 527 F.2d at 959. The accused objected that the evidence was not sworn as required by the extradition treaty. *Id.* at 959-60. The government argued that the evidence was nonetheless admissible because it had been authenticated under section 3190. *Id.* at 960. The court rejected this argument. *Id.* at 960-61. A direct conflict exists between the First Circuit's *Greci* decision and the Ninth Circuit's decision below.

The Ninth Circuit's decision is likewise in conflict with the practice traditionally followed by federal courts. This Court has held that "[t]he function of the committing magistrate [in extradition] is to determine whether there is *competent* evidence to justify holding the accused to await trial. . . ." *Collins v. Loisel*, 259 U.S. 309, 316 (1922) (emphasis added; citations omitted).

Accordingly, district courts hearing extradition requests can and do exclude incompetent evidence. *See, e.g., In re Sindona*, 450 F. Supp. 672, 679-80 (S.D.N.Y. 1978) (sustaining accused's objections to eight depositions for failure to comply with Treaty requirements); *United States v. Artukovic*, 170 F. Supp. 383, 391 (S.D. Cal. 1959) (excluding affidavits "because the affiants testified to matters of which they could not possibly have personal knowledge"). *But cf. In re Assarsson*, 635 F.2d 1237, 1246 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981).

Even the Ninth Circuit in *Zanazanian v. United States*, 729 F.2d 624 (9th Cir. 1984), indicated that certification of evidence under section 3190 did not make it automatically admissible. In *Zanazanian*, the court considered the admissibility of certain double hearsay evidence—a police officer's statement summarizing statements of other witnesses. Although the officer's statement had been certified under section 3190, it was deemed admissible only because there were sufficient indicia of the reliability of the hearsay it contained. *Id.* at 627-28. If the *Zanazanian* court had considered section 3190 certification sufficient, analysis of the reliability of the hearsay would have been unnecessary.

But for the lower courts' view of section 3190, Mr. Oen's objections would have required consideration. First, the Hong Kong government presented the extradition court with unreliable multiple hearsay statements, a practice upon which the *Zanazanian* decision and others cast doubt. *See* 729 F.2d at 627. Unlike the police officer's statement in *Zanazanian*, the affirmations here often failed to identify the hearsay declarants whose statements were repeated.[13] The affirmations also purported to repeat the statements of third persons whose own testimony, also submitted, did not corroborate the statements.[14]

Second, the Hong Kong government presented evidence lacking foundation, a practice rejected in *United States v. Artukovic*, 170 F. Supp. at 391. The affirmations contained numerous conclusory statements by Union Bank personnel imputing responsibility for all aspects of bank transactions to Mr. Oen. Most of this evidence lacked facts establishing the witnesses' knowledge of Mr. Oen's involvement in Union Bank affairs.[15]

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[13] In relation to a repayment of one of the allegedly false loans, Jonathan Newman, Union Bank's general manager, testified:

> [I]t was indicated to us by members of the management of the Union Bank of Hong Kong that this token payment could actually have been made by Mr OEN Yin-choy himself and not the [borrowing] company.

(CR 16 at 1096.) Mr. Newman did not identify the source of this hearsay.

[14] Lee Yue-wing, for example, stated that "OEN Yin-choy instructed HIOE Mie-joeng in my department to be fully responsible for handling all matters relating to [ACU deposits]." (CR 15 at 448.) But Ms. Hioe testified that Lee Yue-wing gave her these instructions. (CR 15 at 570.)

[15] For example, Paul Kaseger, a member of Union Bank's Loans Committee, stated: "I was given to understand when the loans [*sic*] applications were presented that all these Indonesian loans had already been approved by the Chairman. . . ." (CR 15 at 708.) Mr. Kaseger supplied no basis for this statement.

Third, the Hong Kong government presented the extradition court with unqualified legal conclusions.[16] Legal conclusions of lay witnesses do not constitute competent evidence. *See Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977); 7 Wigmore, *Wigmore on Evidence* § 1953 at 103 (Chadbourn Rev. 1978).

Because of the Ninth Circuit's view of section 3190, none of this incompetent evidence was excluded. That view is in conflict with the view of at least one other circuit and with the role that federal courts have traditionally played. Following that view breaches the obligation of the extradition court to exclude incompetent evidence, as set forth in *Collins v. Loisel.*

Additionally, if the Ninth Circuit's interpretation of section 3190 were correct, *i.e.*, that section 3190 grants consular officials—employees of the executive branch—power to determine the competency of evidence before a court, then section 3190 would violate the separation of powers. The Constitution's separation of powers is a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The risk of encroachment on the judiciary's independence exists when " 'any matter which, from its nature, . . . ' has traditionally been tried in Article III courts," is withdrawn and allocated to a non-Article III officer. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 854 (1986) (*quoting Murray's Lessee v. Hoboken Land and Improv. Co.*, 60 U.S. (18 How.) 272, 284 (1856)).

This Court recognized the Article III character of judging the quality of evidence in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). There, the Court found constitutionally infirm a statute whereby "the court [was] forbidden to give the effect to

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[16] The courts below placed heavy reliance on the affirmation of J.M.H. Grimsdick, the Hong Kong government's accountant (CR 14 at 238-39), in ruling on the issue of loan falsity. (App. F at A-20; CR 12 at 1559; Nov. 6, 1987 Habeas Petition Hearing Tr. at 18-19.) Much of Mr. Grimsdick's testimony consisted of his legal opinions. For example, he repeatedly opined that the loan forms at issue were "misleading and false." (*See, e.g.*, CR 14 at 242.)

evidence which, in its own judgment, such evidence should have, and [was] directed to give it an effect precisely contrary." *Id.* at 147. Since, according to the Ninth Circuit, section 3190 contains the same type of prohibition, that statute contains the same infirmity. The Ninth Circuit's interpretation of section 3190 therefore must be rejected. Whenever possible, federal courts must interpret acts of Congress to avoid constitutional infirmity. *See, e.g., United States v. Security Indus. Bank*, 459 U.S. 70, 78-79 (1982). The First Circuit's *Greci* decision correctly interprets section 3190 and should be followed.

V. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A DISTRICT COURT JUDGE MAY HEAR A HABEAS CORPUS PETITION CHALLENGING THAT JUDGE'S CERTIFICATION OF EXTRADITABILITY

District Judge Robert H. Schnacke granted the request for extradition. Judge Schnacke's decision was not appealable and could be contested only by a petition for a writ of habeas corpus under 28 U.S.C. § 2241. *Plaster v. United States*, 720 F.2d 340, 349 (4th Cir. 1983). When Mr. Oen's habeas petition, pursuant to the district court's "related case" rule, was re- assigned to Judge Schnacke, Mr. Oen requested Judge Schnacke to disqualify himself under 28 U.S.C. § 455(a). (CR 3, 4.) Judge Schnacke denied that request. (App. K at A-41.) The Ninth Circuit affirmed, holding that a judge who presides over an extradition hearing may hear a habeas petition in the same matter. (App. F at A-21-A-22.) The Ninth Circuit followed opinions of the Sixth and Seventh Circuits,[17] but ignored the conflicting reasoning of the Fourth Circuit's decision in *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978). Certiorari should be granted to resolve this conflict regarding whether a district court

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[17] *See Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *David v. Attorney General*, 699 F.2d 411, 416-17 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983).

judge must recuse himself in habeas proceedings initiated to review his own extradition ruling.[18]

In *Rice v. McKenzie*, petitioner's habeas petition was assigned to a district judge who participated in rejection of the same claims while sitting on the state supreme court. The Fourth Circuit held that recusal under section 455(a) was mandated. Relying in part upon 28 U.S.C. § 47, which prohibits a federal judge from sitting to hear or determine an appeal in a case he tried, the court reasoned that the habeas judge was, in effect, being asked to review proceedings below. *Id.* at 1117. In such a case, "the likelihood of the presence of partiality is sufficiently great to support a rule of absolute disqualification." *Id.* at 1118. Recusal under section 455(a) was ordered even though there was no indication of personal bias or prejudice. *Id.* at 1115-16. *See also Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 108 S. Ct. 2194, 2203 (1988) ("Scienter is not an element of a violation of § 455(a). . . . [T]he purpose of the provision [is] to promote confidence in the integrity of the judicial process . . . ." (citation omitted)).

The reasoning of *Rice v. McKenzie* is compelling in the extradition context. The district judge sits as a reviewing court to review the extradition proceedings. *Shapiro v. Ferrandina*, 355 F. Supp. at 563, 567. The independent review required by a writ of habeas corpus, *Fay v. Noia*, 372 U.S. 391, 423-24 (1963), can be provided only by a judge who did not hear the extradition proceedings. "While it is unusual for one District Judge to be required to review the action of another District Judge, there is no

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[18] This issue is avoided in many districts by assigning the extradition request to a magistrate. *See* Local Rule (L.R.) 501-1(c), S.D. Cal.; L.R. 32.1(a)(3), M.D. Ala.; L.R. 19.01(a)(1), D.S.C.; Local Magistrate Rule (L.M.R.) 1.(a)(11), E.D. Wash.; L.R. 13.01(a)2, E.D. Wis.; L.M.R. 1(e), D. Mass.; and L.M.R. 9, S.D.N.Y. and E.D.N.Y. If the magistrate grants extradition, habeas review occurs before a district court judge. Other courts assign extradition proceedings to district court judges but have a different judge hear the habeas proceedings. *See Shapiro v. Ferrandina*, 355 F. Supp. 563, 567 (S.D.N.Y.), *modified and aff'd*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

escape from the necessity to do so in extradition proceedings . . . ." *Shapiro v. Ferrandina*, 355 F. Supp. at 567.

In *David v. Attorney General*, the Seventh Circuit refused to follow *Rice v. McKenzie* for two reasons. First, the court asserted that the *Rice* reasoning would require that any case reversed on appeal be assigned to a different judge on remand. 699 F.2d at 416. A similar argument was made by the Ninth Circuit here. (App. F at A-21-A-22.) Second, the *David* court found that since habeas petitions under 28 U.S.C. § 2255 are heard by the judge who presided at the petitioner's trial, there was no *per se* impropriety in a judge ruling on a collateral attack against his own decision. 699 F.2d at 416.[19] This argument was also the basis for the Sixth Circuit's decision in *Demjanjuk v. Petrovsky*, 776 F.2d at 577.

Neither argument is persuasive. First, the circumstance of a district judge presiding over a retrial following a reversal is inapposite. The judge is not asked to "sit as a reviewing court" of his own proceedings. *Shapiro v. Ferrandina*, 355 F. Supp. at 567. Second, proceedings under section 2255 are not analogous to the section 2241 challenge of an extradition order. The petitioner in section 2255 proceedings has a full right of appeal. The only review of an extradition order is by a habeas petition. This unique circumstance dictates the fashioning of a special rule for extradition cases. This Court should grant certiorari to settle whether such a special rule should be adopted.

VI. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHAT EVIDENCE AN ACCUSED MAY PRESENT IN OPPOSING HIS EXTRADITION

In *Collins v. Loisel*, 259 U.S. 309, 316-17 (1922), this Court held that the accused in extradition proceedings may introduce "explanatory" but not "contradictory" evidence on probable cause. Application of that rule has proved difficult, as illustrated

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[19] The *David* court did recognize, of course, that Rule 4(a) of the Rules Governing Section 2255 Proceedings was not controlling in habeas proceedings brought under 28 U.S.C. § 2241. 699 F.2d at 416.

by this case. Those difficulties make granting certiorari to clarify *Collins* appropriate.

In *Collins*, this Court stated:

> To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government.

259 U.S. at 316-17 (*quoting Charlton v. Kelly*, 229 U.S. 447 (1913)). *Collins* has been interpreted to mean that "the accused has no right to introduce evidence which merely contradicts the demanding country's proof. . . . [T]he accused has the right to introduce evidence that is 'explanatory' of the demanding country's proof." *In re Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y. 1978). *Accord In re D'Amico*, 185 F. Supp. 925, 930 (S.D.N.Y. 1960), *appeal dismissed*, 286 F.2d 320 (2d Cir.), *cert. denied*, 366 U.S. 963 (1961).

However, "[t]he distinction between 'contradictory evidence' and 'explanatory evidence' is difficult to articulate." *In re Sindona*, 450 F. Supp. at 685. "Courts have struggled to clarify the distinction." *Republic of France v. Moghadam*, 617 F. Supp. 777, 782 (N.D. Cal. 1985). *See also Freedman v. United States*, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977). Some courts have held that "evidence which 'tends to obliterate probable cause may be considered . . . .'" *Freedman v. United States*, 437 F. Supp. 1252, 1266 (N.D. Ga. 1977) (quoting *Shapiro v. Ferrandina*, 355 F. Supp. at 572); *Republic of France v. Moghadam*, 617 F. Supp. at 782.

Mr. Oen presented the district court with evidence that the Hong Kong government's theory of probable cause was illogical and unsupported. The district court refused to consider this evidence, characterizing it as "contradictory." The Ninth Circuit affirmed. This characterization is inconsistent with *Collins*.

An essential element of the false accounting charges against Mr. Oen is falsity of the loans; thus, to obtain extradition, the Hong Kong government must establish probable cause of such falsity. (*See* App. D at A-8.) The Hong Kong government based

its showing of falsity on the affirmation of its accountant, J.M.H. Grimsdick. Mr. Grimsdick testified that the loan proceeds were not disbursed directly to the named borrowers (CR 14 at 241-52), that he was unable to find written documentation that the named borrowers requested the loan proceeds to be disbursed as they were (*id.* at 242, 244, 246, 248, 250, 252), and that the disbursement pattern was "unduly complex." (*Id.* at 384.) He therefore concluded the loans were false. (*Id.* at 385.)

Mr. Oen submitted the affidavit of David Mace, an accountant and partner of the firm of Arthur Young in Hong Kong. (App. S at A-68-A-71.) Mr. Mace explained that there are numerous legitimate commercial loans in which the loan proceeds are not paid directly to the borrower (*id.* at A-70), and that such payments do not suggest that the loans were false. (*Id.*) Nor do "complex disbursement patterns" suggest falsity. (*Id.*) Moreover, the Hong Kong government's evidence established that when its investigators met with the borrowers, they acknowledged their indebtedness and discussed repayment.[20] Mr. Mace testified that in view of the borrowers' statements, Mr. Grimsdick's conclusions of loan falsity "lack a proper commercial (or logical) basis." (*Id.* at A-71.)

The district court refused to consider Mr. Mace's testimony. When it was raised by Mr. Oen's counsel in the extradition hearing, the district court stated: "What you are suggesting are matters of defense that may well be persuasive when this matter comes to trial in Hong Kong." (CR 12 at 1566.) When Mr. Mace's testimony was raised at the hearing on the habeas petition, the district court stated: "I am sure that will be valuable evidence at the trial . . . [b]ut we don't take conflicting evidence

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[20] Jonathan Newman met twice with Mr. Susanto, the representative of Sinar, the borrower on Counts 1 and 2. Mr. Susanto acknowledged the loans and offered to sell Sinar's assets to repay them. (CR 16 at 1092-93.) Mr. Newman also met with Mr. Muyono, representing Roxy, the borrower on Count 3. Mr. Muyono acknowledged the loan and asked for three more years to pay. (CR 16 at 1093-94, 1096.) Mr. Newman met with Mr. Salim, representing Gaya, the borrower on Count 4. He, too, discussed repayment arrangements. (CR 16 at 1095.)

here." (App. L at A-49.) The Ninth Circuit affirmed the district court's finding of probable cause on the basis of Mr. Grimsdick's testimony (App. F at A-20), and ignored Mr. Mace's testimony. The Ninth Circuit rejected Mr. Oen's argument for rehearing that the court was required to consider Mr. Mace's explanatory evidence. (*See* Petition for Rehearing, filed in the U.S. Court of Appeals for the Ninth Circuit, at 12.)

The courts below misinterpreted *Collins* when they characterized Mr. Mace's testimony as contradictory. Mr. Mace *explained* that the facts that the Hong Kong government was relying upon were not "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [Mr. Oen's] guilt." *See Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973) (defining probable cause).[21] Evidence that explains why the foreign government's theory of probable cause is illogical and unsupported should be admitted and considered under *Collins*. Such evidence "rebut[s] probable cause." *Collins*, 259 U.S. at 316. Certiorari should be granted to correct the conflicting holding of the Ninth Circuit and to clarify the *Collins* rule.

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[21] *Coleman* defines probable cause for preliminary examinations. In extradition proceedings, probable cause is measured by the standard applicable in preliminary examinations. *Charlton v. Kelly*, 229 U.S. at 460.

CONCLUSION

For the above reasons, Mr. Oen respectfully requests this Court to grant his petition for a writ of certiorari.

Dated: March 7, 1989

Respectfully submitted,

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